Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

SANDOZ PHARMACEUTICALS CORPORATION,
now known as Novartis Pharmaceuticals Corporation,
Petitioner,

v.

ANGELA Y. PARNELL, individually and on behalf of her minor son GARRETT PARNELL, and CLINTON PARNELL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a pure question of law that is important and completely separate from the merits of the underlying lawsuit—in this case, the legal standard governing the discoverability of confidential settlement agreements reached in other suits—is *per se* barred from collateral order doctrine review solely because the question arises in a discovery order.

LIST OF PARTIES

In addition to the parties listed in the caption, Sandoz Corporation initially was a defendant in the district court proceedings. Sandoz Corporation was dismissed and was not an appellant.

RULE 29.6 STATEMENT

Petitioner Sandoz Pharmaceuticals Corporation is now known as Novartis Pharmaceuticals Corporation ("NPC"). NPC's immediate parent corporation is Novartis Finance Corporation, whose parent corporation is Novartis Corporation, whose parent corporation is Novartis Holding AG, whose parent corporation is Novartis AG. The only one of these corporations that is publicly held is Novartis AG, which indirectly owns (through the ownership chain set forth above) more than 10% of NPC's stock.

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PETITION FOR WRIT OF CERTIORARI

Sandoz Pharmaceuticals Corporation, now known as Novartis Pharmaceuticals Corporation, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the court of appeals appears in the Appendix (1a). The order of the United States District Court for the Northern District of Florida (per Judge Paul) appears in the Appendix (2a-4a). The prior order of the district court (per Magistrate Judge Sherrill) appears in the Appendix (5a-8a). These orders have not been reported.

JURISDICTION

The order of the court of appeals was entered on February 4, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1291 of Title 28 of the United States Code states, in relevant part, that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . "

STATEMENT

A. Relevant Proceedings in the District Court

This is a products liability lawsuit filed by the plaintiffs ("the Parnells") involving a prescription medication, Parlodel®, that was manufactured and sold by Sandoz Pharmaceuticals Corporation, now known as Novartis Pharmaceuticals Corporation ("NPC").[1] The Parnells' complaint invoked federal jurisdiction based on 28 U.S.C. § 1332, alleging diversity of citizenship and an amount in controversy in excess of $50,000.

For over a decade, NPC has defended numerous Parlodel® suits in state and federal courts around the country, a number of which have been resolved by expressly confidential settlement agreements. The Parnells have not been parties to any of these other cases, although their attorneys in this case also represent the plaintiffs in many other pending Parlodel® suits.

In the course of discovery, the Parnells sought records of all Parlodel® claims settled before litigation and cases "settled post-litigation, including the dates of settlement, nature of injuries, attorneys for the plaintiffs and the amounts of each

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[1] "NPC" refers to both companies collectively.

settlement from 1980 to the present." This Document Request No. 3 led to objections and motions practice.

Most significantly, NPC argued that the settlement agreements and amounts are protected from disclosure by contractually binding and court-ordered confidentiality provisions and that the Parnells had fallen far short of satisfying the applicable legal standard governing such discovery efforts (a particularized or otherwise heightened showing of need for confidential settlement information). *See* NPC's Mem. of Law in Support of Motion for Clarification, at 4-9. Among the numerous authorities cited by NPC were Federal Rule of Evidence 408 and two opinions—*Shipes v. BIC Corp.*, 154 F.R.D. 301 (M.D. Ga. 1994), and *Bottaro v. Hatton Associates*, 96 F.R.D. 158 (E.D.N.Y. 1982)—in which the courts recognized the public policy interests favoring heightened protections for confidential settlement agreements and applied a particularized showing standard to preclude discovery of settlement agreements.

The district court (per Judge Maurice Paul) declined to apply the "particularized showing" legal standard requested by NPC and instead quoted and applied only the liberal discovery standard of Federal Rule of Civil Procedure 26(b)(1). App. 3a ("settlement agreements which contain confidentiality provisions are subject *merely* to Rule 26(b)(1)" (emphasis added)). The district court concluded "that the discovery of the settlement dates and amounts are [*sic*] reasonably calculated to lead to the discovery of admissible evidence" and held "that the presence of confidentiality provisions do [*sic*] not prevent their discovery." App. 3a-4a.

NPC timely filed a notice of appeal on August 9, 1999. The district court subsequently issued a stay pending appeal.

B. Proceedings in the Court of Appeals

In its merits brief, NPC argued that the district court's application of an incorrect legal standard resulted in an unprecedented order compelling production of confidential settlement agreements reached in other lawsuits and that the court of appeals had jurisdiction under the collateral order doctrine. The brief explained that the erroneous application of this legal standard had forced NPC into the position of suffering extraordinary, irreparable harm: compelled disclosure to the very same attorneys prosecuting numerous other Parlodel® suits against NPC of documents containing confidential terms of, and amounts paid in, prior Parlodel® settlements. Furthermore, NPC argued that, by compelling this unusually intrusive discovery based on the less stringent legal standard of Rule 26(b)(1), the district court failed to take into account the substantial harm such a ruling would inflict on important legal principles and public policy interests that favor encouraging settlements by maintaining the confidentiality of settlement agreements.[2]

The Parnells moved to dismiss NPC's appeal for lack of jurisdiction, contending that the district court's order was not appealable because NPC had not yet been cited for contempt. NPC's opposition to this motion re-emphasized that its appeal should be heard because it presented a pure question of law (whether the district court had applied the correct legal standard to the Parnells' discovery request).

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[2] In the alternative, NPC sought appellate review by filing a mandamus petition. In an Order filed September 30, 1999, the court of appeals denied the mandamus petition with the following citation: "*See Rouse v. [sic] Construction International, Inc. v. Rouse Construction Corp.*, 680 F.2d 743, 745 (11th Cir. 1982) ('Ordinarily, a litigant seeking to overturn a discovery order has two choices. Either he can comply with the order or he can refuse to comply with the order and contest its validity if subsequently cited for contempt for his refusal to obey.')."

The court of appeals granted the motion to dismiss on February 4, 2000. App. 1a. It held that the "discovery order is neither final nor immediately appealable" and cited 28 U.S.C. §§ 1291, 1292—as well as *Rouse Construction International v. Rouse Construction Corp.*, 680 F.2d 743, 745 (11th Cir. 1982), where the court stressed the availability of appellate review from a possible contempt citation in dismissing for lack of jurisdiction a collateral order doctrine appeal of a discovery order.

REASONS FOR GRANTING THE PETITION

The appellate jurisdiction rules "define vitally important aspects of our court structure," and, for over two centuries, "the final judgment rule [of 28 U.S.C. § 1291] has been the heart of appellate jurisdiction in the federal system." 15A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3907, at 268-69 (2d ed. 1992). Federal appellate jurisdictional issues are so significant that courts are required to consider *sua sponte* whether they have appellate jurisdiction, even when the parties have not questioned their jurisdiction. *See, e.g., Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1064 & n.1 (7th Cir. 1981). Thus, it is important that the circuit courts fully exercise their jurisdiction as determined by this Court and uniformly construe the scope of their jurisdiction, so that they can decide correctly and consistently which orders can, and cannot, be appealed under § 1291.

A significant basis for appellate jurisdiction—the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its progeny—presents special challenges in this regard. Whether viewed as a "practical . . . construction" of the § 1291 final judgment rule, *id.* at 546, or as "an exception" to this jurisdictional statute, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276

(1988), the collateral order doctrine is a "safety valve" that permits appeals from a narrow class of orders issued in pending cases that would not be appealable under a technical, rigid interpretation of the final judgment rule.

Moreover, in some of its most recent collateral order doctrine cases, this Court has stated that the appealability question cannot be resolved on an ad hoc basis for each individual appeal, but must be "decide[d] . . . for categories of orders." *Johnson v. Jones*, 515 U.S. 304, 314 (1995); *see Behrens v. Pelletier*, 516 U.S. 299, 312 (1996) ("appealability determinations are made for classes of decisions, not individual orders in specific cases"). (In applying the collateral order doctrine, the *Johnson* Court distinguished between two categories of qualified immunity rulings: immediately appealable orders presenting "abstract issues of law" and non-appealable orders based on the presence of a genuine issue of fact for trial. *See Johnson*, 515 U.S. at 316-17.)

By dismissing NPC's appeal involving an important issue of law, the circuit court below made an appealability determination based on a pro forma classification of the order at issue as a "discovery order"—without recognizing that an important pure question of law presented in a discovery order can qualify for review under the collateral order doctrine. The Eleventh Circuit in this case, and certain other circuit courts that have categorically precluded parties from using the doctrine to appeal discovery orders, have unduly restricted the scope of their appellate jurisdiction and have failed to distinguish between those relatively rare discovery orders that present pure issues of law and the large majority of discovery orders that involve only fact-based or discretionary rulings.

Here, the Eleventh Circuit ruled on an important issue of federal appellate jurisdiction that has not been—but should be—resolved by this Court and decided the issue in a way that

conflicts with this Court's more discerning approach to analyzing the collateral order doctrine appealability issue in *Johnson*, 515 U.S. 304. This petition presents the Court with an opportunity to resolve this important jurisdictional issue and, in the process, end the confusion among the lower courts over whether parties are ever permitted to appeal discovery orders under the collateral order doctrine. For these and other reasons discussed below, the petition should be granted.

I. Review Is Necessary For The Court To Resolve This Important Issue Of Federal Appellate Jurisdiction And Decide Whether The Collateral Order Doctrine Permits Parties To Appeal Discovery Orders Presenting Pure Issues Of Law That Are Important And Completely Separate From The Merits Of The Underlying Lawsuit.

The order dismissing NPC's appeal for lack of jurisdiction relied upon *Rouse Construction International v. Rouse Construction Corp.*, 680 F.2d 743, 745 (11th Cir. 1982). App. 1a. In *Rouse*, the defendant pursued a collateral order doctrine appeal of an order compelling post-judgment discovery. The court held that it lacked appellate jurisdiction over this non-final order and explained that litigants dissatisfied with a discovery order have only two choices: "comply with the order and challenge it at the conclusion of the case or . . . refuse to comply with the order and contest its validity if subsequently cited for contempt." *Rouse*, 680 F.2d at 745. In other words, the *Rouse* court held that discovery orders are not appealable under the collateral order doctrine —and may be appealed only in other ways (a direct appeal from a final judgment, either at the conclusion of the case or after a contempt citation). Thus, the court of appeals in this case dismissed NPC's appeal based on the conclusion that the collateral order doctrine never permits parties to appeal discovery orders pending completion of the underlying lawsuit.

This jurisdictional ruling should be reviewed by this Court for the following reasons:

1. The appeals court's ruling in this case presents an important issue of federal appellate jurisdiction that has not been, but should be, resolved by this Court. An integral aspect of the orderly adjudication of lawsuits is determining when district court rulings can be appealed in a manner that does not render meaningless the jurisdictional final judgment rule of § 1291, but also appropriately allows occasional appellate review of important orders issued during pending litigation.

This principle was at the foundation of this Court's *Cohen* ruling. Recognizing the need for a "practical rather than a technical construction" of the final judgment rule, the Court concluded that appeals courts have jurisdiction to review certain "collateral" orders before final judgment. *Cohen*, 337 U.S. at 546. Such orders are immediately appealable if they will be effectively unreviewable after final judgment and if they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* The Court "has restated *Cohen* as requiring that the order [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Johnson*, 515 U.S. at 310 (brackets in original) (quotation marks omitted).

In deciding whether the collateral order doctrine allows a given category of orders to be appealed, courts are required to weigh competing interests, such as "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other," *id.* at 315 (quotation marks omitted). Although § 1291 generally precludes

piecemeal appellate review, this Court has recognized that "a rigid insistence on technical finality would sometimes conflict with the purposes of the statute." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 471 (1978) (citing *Cohen*). In short, "statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976).

Despite having frequently applied the collateral order doctrine in a variety of contexts,[3] this Court has not resolved the issue presented in this petition: whether parties are *per se* precluded from appealing civil discovery orders under the doctrine, even when an order presents a pure issue of law that is important and completely separate from the merits of the underlying lawsuit. It is imperative for the Court to resolve this jurisdictional issue because the lower courts and numerous litigants need guidance regarding how to interpret and apply the collateral order doctrine in deciding whether discovery orders are ever immediately appealable and, if so, under what circumstances. A Supreme Court ruling on this issue would significantly decrease the time and expense wasted by unnecessary jurisdictional litigation. *Cf. Bowen v. Massachusetts*, 487 U.S. 879, 929 (1988) (Scalia, J., dissenting) ("[n]othing is more wasteful than litigation about where to litigate").

2. By dismissing NPC's collateral order doctrine appeal merely because it arose from a discovery order, the court of

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[3] *See, e.g., Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995) (order denying county commission's summary judgment motion); *Gulfstream*, 485 U.S. 271 (order denying motion to stay or dismiss federal suit due to similar litigation pending in state court); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (order granting motion to stay federal suit due to similar litigation pending in state court); *Coopers*, 437 U.S. 463 (order denying class certification).

appeals below failed to draw a careful distinction between orders presenting purely legal issues and fact-specific orders, as this Court did in resolving the collateral order doctrine appealability issue in *Johnson*, 515 U.S. 304. The Eleventh Circuit's approach to the appealability of discovery orders—like the holdings of certain other circuits that categorically preclude parties from appealing discovery orders under the collateral order doctrine[4]—erroneously chops off a significant branch of appellate court jurisdiction. Moreover, by failing to distinguish between two different categories of discovery orders, these courts have undermined the foundation of the collateral order doctrine and not fulfilled their obligation to exercise their appellate jurisdiction faithfully and completely in accordance with the principles set forth by this Court in *Cohen* and its progeny.

A carefully calibrated approach to deciding which discovery orders can be appealed under the collateral order doctrine is required by *Cohen* and is far preferable to the blunt conclusion that the doctrine never permits parties to appeal discovery orders. Those circuit courts that make the theoretical availability of a contempt citation the dispositive disqualifying factor in their collateral order doctrine analysis

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[4] *See Chase Manhattan Bank, N.A. v. Turner & Newell, PLC*, 964 F.2d 159, 163 (2d Cir. 1992) (dismissing appeal of order rejecting party's attorney-client privilege assertions and "re-affirm[ing the court's] long-stated view that *Cohen* does not provide jurisdiction to review interlocutory discovery orders"); *Coleman v. American Red Cross*, 979 F.2d 1135, 1138 (6th Cir. 1992) ("We have repeatedly held that orders denying or granting discovery are not appealable under the collateral order doctrine."); *Dow Chemical Co. v. Taylor*, 519 F.2d 352 (6th Cir. 1975) (dismissing appeal of order requiring party to answer interrogatory); *Simmons v. City of Racine*, 37 F.3d 325, 327 (7th Cir. 1994) (holding that "discovery orders in particular, are not appealable despite their irreversible costs"); *but see infra* at 25-27 (discussing other circuit court opinions that permit parties to take collateral order doctrine appeals of discovery orders under certain circumstances).

completely ignore the substantial systemic benefits of prompt appellate rulings on important questions of law. The availability of contempt is a bright-line rule that may serve what is understandably every appellate court's natural inclination to dispose quickly of any discovery-related appeals, including even those rare appeals that present important pure legal questions that are completely collateral to the merits of the underlying claims. However, the jurisdictional inquiry—and an appellate court's ability to resolve an important legal question promptly for the benefit of numerous other courts and litigants—should not depend on the sheer fortuity of whether the party harmed by the order is willing to incur (and the district court is willing to issue) a contempt citation, especially in light of the confused, oft-criticized body of law governing the appealability of contempt citations, *see infra* at 22-23.

Discovery orders, to be sure, are issued so frequently that they generally cannot—and should not—qualify for collateral order doctrine review. Permitting interlocutory review of these mostly fact-bound, discretionary rulings would seriously undermine the principles behind the final judgment rule and deviate substantially from one of *Cohen*'s central points: that immediate appeals of orders issued in pending cases should be limited to a "small class [of decisions] . . . too important to be denied review," 337 U.S. at 546.

But that admonition should not continue to be construed to bar categorically certain rare and important discovery orders from collateral order doctrine review. In conclusively resolving a disputed issue, a discovery order sometimes threatens irreparable harm to a significant legal interest and presents an important question of law that an appellate court can address without becoming embroiled in factual issues (or matters committed to a district court's discretion). The order that NPC appealed in this case exemplifies the kind of discovery order that presents a pure question of law—what

legal standard applies when a party seeks discovery regarding the opposing party's confidential settlement agreements—the resolution of which would benefit numerous courts and litigants. Permitting an immediate appeal of this kind of collateral order would be entirely consistent with *Cohen* and its progeny and would not undermine the interests served by the final judgment rule.

In addition to the well-established limiting principles that already preclude many discovery orders from being appealed under the collateral order doctrine,[5] the Court should hold that the legal question/factual issue distinction discussed in *Johnson*, 515 U.S. 304, also applies when parties rely on the doctrine to appeal discovery orders. The *Johnson* Court did not categorically exclude all qualified immunity rulings from the scope of the collateral order doctrine, nor did it address the theoretical availability of an appeal from a contempt citation or other kind of sanction. Instead, the Court held that a district court's ruling on a qualified immunity defense can be reviewed under the collateral order doctrine if the appeal presents a question of law, but not if the ruling was based on the existence of a genuine issue of fact.

In justifying this more nuanced approach to deciding which orders are immediately appealable, the *Johnson* Court focused on the different ways in which the judicial system

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[5] The first requirement of the collateral order doctrine (as most often formulated in this Court's recent opinions)—that the order "'conclusively determine the disputed question,'" *Gulfstream*, 485 U.S. at 276 (quoting *Coopers*, 437 U.S. at 468)—filters out any discovery orders that are plainly subject to further review or revision by the district court. The third prong—that the order is " 'effectively unreviewable on appeal from a final judgment,' " *id.*—disqualifies a large category of discovery orders that do not threaten irreparable harm to a party's legal interests, in that any harm caused by such orders can be satisfactorily remedied by a reversal on appeal from a final judgment.

would dispose of—and benefit from—collateral order doctrine appeals presenting purely legal issues:

> For one thing, the issue here at stake—the existence, or nonexistence, of a triable issue of fact—is the kind of issue that trial judges, not appellate judges, confront almost daily. Institutionally speaking, appellate judges enjoy no comparative expertise in such matters. And, to that extent, interlocutory appeals are less likely to bring important error-correcting benefits here than where purely legal matters are at issue . . . .
>
> For another thing, questions about whether or not a record demonstrates a "genuine" issue of fact for trial, if appealable, can consume inordinate amounts of appellate time . . . .
>
> For a third thing, the close connection between this kind of issue and the factual matter that will likely surface at trial means that the appellate court . . . may well be faced with approximately the same factual issue again, after trial, with just enough change brought about by the trial testimony to require it, once again, to canvass the record. That is to say, an interlocutory appeal concerning this kind of issue in a sense makes unwise use of appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision.
>
> *The upshot is that . . . considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources argue in favor of limiting interlocutory appeals of "qualified immunity" matters to cases presenting more abstract issues of law.*

Id. at 316-17 (emphasis added) (citations omitted); *see Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) ("The immunity question is a pure issue of law, appropriate for our immediate

resolution."); *Gulfstream*, 485 U.S. at 291-92 (Scalia, J., concurring) (suggesting that Court consider First Circuit's rule that collateral order doctrine appeal must involve "an important and unsettled question of controlling law" (quotation marks omitted)).

The same reasoning and policy concerns pertain to the question of which discovery orders should be appealable under the collateral order doctrine. By applying the pure-question-of-law limiting principle, courts would use their resources wisely and accept immediate appeals of only those unusual discovery orders that present important issues of law and therefore require the particular institutional expertise of a federal appellate court. The threshold issue of appellate jurisdiction would be relatively easy to resolve, enabling courts to distinguish between this narrow class of discovery orders that should be immediately appealable and the vast majority of discovery orders that do not merit collateral order doctrine review.[6]

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[6] This approach would significantly restrict the volume of discovery orders eligible for appeal under the collateral order doctrine because most discovery orders are fact-specific, discretionary rulings that would, in any event, likely be affirmed by a court applying a deferential standard of review. This generalization about the characteristics of discovery orders as a group is one reason proffered by some courts for categorically rejecting parties' efforts to obtain collateral order doctrine review of discovery orders. *See, e.g.*, *Simmons*, 37 F.3d at 327-28 ("almost all interlocutory appeals from discovery orders would end in affirmance (the district court possesses discretion, and review is deferential)"). The generalization does not, however, apply to all discovery orders, such as the district court's settlement-agreement-discovery ruling in this case, which presents an important, pure issue of law subject to de novo appellate review. These kinds of discovery orders satisfy what has been identified as the second prong of the Court's most common statement of the doctrine: that the order being appealed must " 'resolve an important issue completely separate from the merits of the action,' " *Gulfstream*, 485 U.S. at 276 (quoting *Coopers*, 437 U.S. at 468).

Applying the legal question/factual issue distinction would also promote the important policy interest of conserving appellate resources for those collateral order doctrine appeals that are likely to make substantial contributions to the development of the law by generating appellate court opinions on important legal questions (including issues of first impression or those that have produced conflicting court rulings). A prominent civil procedure treatise has emphasized this developing-the-law rationale in discussing the benefits of interlocutory appeals:

> Some areas of substantive and procedural law may present more pressing needs for interlocutory appeal than others. New legislation, for example, often presents substantial ambiguities about matters of widespread importance; increased opportunities to appeal can speed dramatically the development of uniform and clear answers. *Some matters of procedure, such as discovery, may elude review on appeal from final judgments; if courts of appeals are to participate in the process of developing the law, interlocutory appeal may prove the only effective means available.* Some cases present matters of such intrinsic public importance that prompt and proper disposition is unusually important.

15A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3907, at 280 (2d ed. 1992) (emphasis added) ("*Federal Practice*").

In sum, the limiting principle used by this Court in *Johnson* to distinguish between a category of immediately appealable orders (presenting questions of law) and a category of non-appealable orders (presenting issues of fact) is well-suited to enable courts to sort out discovery orders that do, and do not, qualify for immediate review under the collateral order doctrine. The legal question/factual issue distinction is consistent with the principles of *Cohen* and its progeny and would appropriately allow parties to appeal those rare

discovery orders that are completely separate from the merits of the underlying litigation and present important issues of law warranting immediate appellate review.

3. NPC's appeal in this case is a perfect example of how the collateral order doctrine should permit review of certain rare, important discovery orders—and could do so without inundating the circuit courts with interlocutory appeals of run-of-the mill discovery disputes.

The district court "conclusively determined" the disputed question of whether the Parnells were entitled to obtain NPC's expressly confidential settlement agreements. App. 2a-4a. Thus, the district court's decision satisfied the first prong of the collateral order doctrine.

NPC's appeal also presented an "important issue" in accordance with the second prong of doctrine. A circuit court ruling establishing the legal standard that governs the discoverability of confidential settlement agreements would affect numerous other courts and litigants beyond those involved in this case—and would resolve an important issue that has generated directly conflicting district court rulings. Most district courts have taken into account the strong policy reasons favoring settlement agreements and held that parties may not obtain discovery of confidential settlement agreements without making a "particularized," or heightened, showing that these otherwise inadmissible documents are likely to lead to admissible evidence.[7] On the other hand, a few courts—including the district court in this case—have

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[7] *See Shipes v. BIC Corp.*, 154 F.R.D. 301, 309 (M.D. Ga. 1994); *Lesal Interiors, Inc. v. Resolution Trust Corp.*, 153 F.R.D. 552, 561-64 (D.N.J. 1994); *Kalinauskas v. Wong*, 151 F.R.D. 363, 367 (D. Nev. 1993); *Fidelity Fed. Sav. & Loan Ass'n v. Felicetti*, 148 F.R.D. 532, 534 (E.D. Pa. 1993); *Weissman v. Fruchtman*, No. 83 Civ. 8958, 1986 WL 15669, at *20 (S.D.N.Y. Oct. 31, 1986); *Bottaro v. Hatton Assocs.*, 96 F.R.D. 158, 160 (E.D.N.Y. 1982).

disagreed with this approach and have merely applied the liberal discovery standard of Rule 26(b)(1) without taking into account any policy-based protections for the confidentiality of settlement agreements.[8] And only one reported circuit court opinion has addressed an order compelling disclosure of confidential settlement agreements, commenting in dicta and without addressing the pure legal question presented in NPC's appeal. *See Bacher v. Allstate Ins. Co.*, ___ F.3d ___, 2000 WL 424320, at *6 (3d Cir. Apr. 20, 2000) (stating that order compelling production of defendant's settlement agreements is "troubling because so many factors may lead to a settlement in any particular case," but dismissing appeal for lack of jurisdiction).[9]

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[8] *See Burda Media, Inc. v. Blumenberg*, No. 97 Civ. 7167, 1999 WL 413469, at *3 (S.D.N.Y. June 21, 1999); *Bennett v. La Pere*, 112 F.R.D. 136, 139-41 (D.R.I. 1986). Unlike the order compelling NPC to produce settlement agreements executed in *other* cases, the courts in *Burda* and *Bennett* faced the materially different question of whether a non-settling defendant should be given access to a settlement agreement reached in the *same* case between the plaintiff and a co-defendant/potential witness. Under these circumstances, Rule 408 contains a specific exception to the general prohibition against admitting settlement-related evidence, and courts often admit such evidence for the purpose of allowing a party to "prove bias or prejudice of the witness," Fed. R. Evid. 408.

[9] In holding that it lacked collateral order doctrine jurisdiction, the Third Circuit stated that it "is questionable as to whether the [doctrine's] separability requirement is satisfied" and pointed out that "review of the district court's order necessarily will entail some determination as to whether the settlement information sought by the [plaintiffs] is relevant to the merits of [their claims]." *Bacher*, 2000 WL 424320, at *4. Thus, the appeal in *Bacher* challenged the district court's relevance determination and necessarily called upon the appeals court to engage in a fact-specific analysis required to decide whether this relevance ruling was erroneous. In this respect, the issue addressed in *Bacher* differs materially from the pure question of law that NPC presented in its appeal to the Eleventh Circuit. Instead of asking the appeals court to decide a fact-specific issue of relevance, NPC's appeal presented an abstract legal question completely separate from the merits of the underlying litigation: what

The importance of the question presented by NPC's appeal also extends far beyond this one case because rulings that discourage prompt settlements of civil suits are likely to affect the ability of courts to handle increasingly burdensome dockets. As this Court has repeatedly recognized, public policy favors encouraging parties to settle their lawsuits. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994); *Evans v. Jeff D.*, 475 U.S. 717, 736-37 (1985); *Marek v. Chesny*, 473 U.S. 1, 10 (1985); *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 (1981); *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U.S. 650, 656 (1898). The circuit courts have also stressed the importance of fostering settlements:

> There is no question that fostering settlement is an important Article III function of the federal district courts. Every case must be dropped, settled, or tried, and a principle function of a trial judge is to foster an atmosphere of open discussion among the parties' attorneys and representatives so that litigation may be settled promptly and fairly so as to avoid the uncertainty, expense, and delay inherent in a trial.

United States v. Glens Falls Newspapers, Inc., 160 F.3d 853, 856 (2d Cir. 1998); *see Reichenbach v. Smith*, 528 F.2d 1072, 1074 (5th Cir. 1976) ("With today's burgeoning dockets and the absolute impossibility of [c]ourts ever beginning to think that they might even be able to hear every case, the cause of justice is advanced by settlement compromises shepherded by competent counsel, whose experience as advocates makes them reliable predictors of litigation were it pursued to the bitter end.").[10]

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legal standard governs the discoverability of confidential settlement agreements reached in other lawsuits.

[10] The D.C. Circuit has stated that "[v]oluntary settlement of civil controversies is in high judicial favor," *Autera v. Robinson*, 419 F.2d

Likewise, Congress has expressed the strong public policy favoring settlements in various ways. By enacting Federal Rule of Evidence 408, it made "[e]vidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim . . . not admissible to prove liability for or invalidity of the claim or its amount." The purpose of Rule 408 "is to encourage settlements which would be discouraged if such evidence were admissible." S. Rep. No. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7056; *see Westchester Specialty Ins. Servs., Inc. v. U.S. Fire Ins. Co.*, 119 F.3d 1505, 1512 (11th Cir. 1997); *Reichenbach*, 528 F.2d at 1074.[11]

1197, 1199 (D.C. Cir. 1969), and numerous other circuit courts have emphasized the importance of settlements, *see, e.g., In re Smith*, 926 F.2d 1027, 1029 (11th Cir. 1991); *Federal Data Corp. v. SMS Data Prods. Group, Inc.*, 819 F.2d 277, 279 (Fed. Cir. 1987); *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046, 1050 (Fed. Cir. 1986); *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1164 (5th Cir. 1985); *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977).

[11] Moreover, in amending the Federal Rules of Civil Procedure, Congress specifically encouraged courts and parties to consider at pretrial conferences "settlement and the use of special procedures to assist in resolving the dispute" and authorized courts to "require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute." Fed. R. Civ. P. 16(c); *see* Advisory Committee Notes to Rule 16, 1983 Amendments, Subdivision (c) ("Since it obviously eases crowded court dockets and results in savings to litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible."); *cf.* Fed. R. App. P. 33 (authorizing circuit courts to direct attorneys and parties to participate in settlement conferences). When Congress directed district courts to implement plans for reducing civil justice expense and delay, the legislation stated that the courts "shall consider and may include" various measures designed to encourage voluntary resolution of litigation through settlement conferences or alternative dispute resolution programs. *See* 28 U.S.C. §§ 473(a)(3), (6); (b)(5).

In addition to expressing the public policy favoring settlements, courts have also recognized that confidentiality is often a necessary or "material" ingredient to the successful settlement of a civil suit. *See Glens Falls*, 160 F.3d at 858 ("release of these discussions and documents [relating to settlement negotiations] is likely to impair materially the trial court's performance of its Article III function of crafting a settlement of this case"); *see also Empire Blue Cross & Blue Shield v. Janet Greeson's A Place for Us, Inc.*, 62 F.3d 1217, 1220 (9th Cir. 1995); *Grove Fresh Distribs., Inc. v. John Labatt Ltd.*, 888 F. Supp. 1427, 1441 (N.D. Ill. 1995), *aff'd without publ. op.*, 134 F.3d 374 (7th Cir. 1997); *Flynn v. Portland General Elec. Corp.*, No. Civ. 88-455-FR, 1989 WL 112802, at *2 (D. Or. Sept. 21, 1989). As a leading civil procedure expert has explained, "[f]rom the defendant's perspective, confidentiality ensures that the settlement amount will not be used . . . as unfair leverage to extract a similar payment in subsequent suits that may be meritless" and has concluded that, "absent special circumstances, a court should honor confidentialities that are bargained-for elements of settlement agreements," Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 485-86 (1991) ("*Confidentiality*").

The increasing frequency with which defendants are being drawn into "serial" litigation further heightens the importance of the public policy issues presented by settlement-agreement-discovery orders. Like any serial litigant, NPC certainly would have been less likely to settle prior Parlodel® suits and would have calculated their settlement "values" differently if it had known that opposing counsel in other suits could so easily gain access to its confidential settlement agreements by simply issuing a document request—without even making a particularized showing that these inadmissible documents are likely to lead to the discovery of admissible evidence. Discouraging settlements by permitting such discovery would greatly undermine the ability of courts to

administer justice efficiently and secure "the just, speedy, and inexpensive determination of every action," Fed. R. Civ. P. 1; *see Confidentiality*, 105 Harv. L. Rev. at 486 ("Our civil justice system could not bear the increased burden that would accompany reducing the frequency of settlement or delaying the stage in the litigation at which settlement is achieved.").

The question presented in NPC's appeal also satisfied the collateral order doctrine requirement of "separateness." The appeal addressed a pure issue of law, subject to de novo review, that was completely separate from the merits of the Parnell's underlying products liability claims. By seeking a ruling on what legal standard governs a dispute involving one party's asserted right to obtain confidential settlement agreements and the other party's asserted right to protect their confidentiality, NPC called upon the appeals court's institutional expertise in resolving issues of law and policy. The question presented did not require the court to review a factual record and therefore was truly "collateral" to the merits of the underlying claims within the meaning of *Cohen* and its progeny.

Finally, the district court ruling at issue here will be effectively unreviewable on appeal from an eventual final judgment, as required by the last prong of the collateral order doctrine. If the Parnells and their counsel gain access to NPC's confidential settlement agreements, a subsequent reversal of the order compelling this discovery would not cure the serious harm to NPC's interests.

Under these circumstances, it would be unduly harsh to require NPC to incur a contempt citation, merely to ensure that it enters the appeals court through a different procedural doorway. This inequitable result would exalt form over substance—without serving the interests upon which the collateral order doctrine is based—and would only unnecessarily further delay an appellate court's resolution of this important, unsettled legal issue.

When an order issued in a pending lawsuit threatens irreparable harm to a party's significant legal interests and presents an important question of law that is completely separate from the merits of the underlying claims, the collateral order doctrine should permit immediate appellate review. As the substantial policy interests discussed above demonstrate, the question presented in such an appeal can be sufficiently important to numerous courts and litigants to warrant immediate appellate review under the principles set forth in *Cohen* and its progeny—and should not depend on the procedural fortuity of whether the appellant has first incurred an immediately appealable contempt citation or other sanction.

This conclusion is especially appropriate in light of the confused state of the law governing appealability of contempt citations and the oft-criticized, unclear distinctions between civil and criminal contempt. Parties to pending civil litigation ordinarily are barred from immediately appealing a civil contempt citation but are allowed to obtain immediate appellate review of a criminal contempt citation. *See, e.g., Fox v. Capital Co.*, 299 U.S. 105, 107-08 (1936); *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1064 (D.C. Cir. 1998). However, both this Court and the Eleventh Circuit have permitted parties to pursue immediate appeals of civil contempt citations. *See Sibbach v. Wilson*, 312 U.S. 655 (1941); *Howard Johnson Co. v. Khimani*, 892 F.2d 1512 (11th Cir. 1990). The civil/criminal contempt distinction has also been repeatedly criticized as an uncertain, unsatisfactory, and unduly harsh way to resolve the appealability issue. *See, e.g., Sealed Case*, 151 F.3d at 1064-65 (D.C. Cir. 1998); *Powers v. Chicago Transit Auth.*, 846 F.2d 1139, 1141-42 (7th Cir. 1988); 15B *Federal Practice* § 3914.23, at 146; *id.* § 3917, at 399-401.

The appealability of contempt citations has unfortunately been reduced to a gamble in which a party not only faces a

difficult dilemma—choosing between disobeying a discovery order that would cause irreparable harm or complying and thereby foregoing appellate review—but also cannot determine in advance whether disobedience will lead to an appealable or non-appealable contempt sanction. *See Sealed Case*, 151 F.3d at 1065 (concluding that post-contempt appellate review is uncertain and inadequate because "[p]etitioner cannot know, ex ante, whether refusal to comply with the discovery order will result in a civil contempt order or a criminal contempt order"); 15B *Federal Practice* § 3917, at 402 ("A party who wishes appellate review of a discovery order can choose disobedience, gambling that the sanction will include an appealable element of criminal contempt."). As the Seventh Circuit has aptly stated in criticizing the distinction between civil and criminal contempt, "[a] party put to a choice between his privileges and his liberty (or purse) ought to have some prompt avenue of review, and district judges ought not be able to determine the reviewability of their own decisions by selecting between criminal and civil contempt." *Powers*, 846 F.2d at 1142 (citation omitted).

* * *

If it were applied in the manner discussed above—as opposed to the approach taken by the Eleventh Circuit in this case—the collateral order doctrine would permit parties to take immediate appeals under limited circumstances of certain important legal questions arising in the context of discovery orders. The legal question/factual issue distinction, along with the other limiting principles previously identified, would permit appellate courts to review a narrow category of discovery orders that present important, pure questions of law —without unduly burdening courts with frequent interlocutory appeals of routine discovery orders.

II. By Granting This Petition And Reviewing This Important Issue Of Federal Appellate Jurisdiction, The Court Would Also Have The Opportunity To Clarify The Circuit Courts' Confused Law Regarding Whether Discovery Orders Can Be Appealed Under The Collateral Order Doctrine.

In the fifty years since *Cohen* was decided, the collateral order doctrine has been frequently invoked by parties seeking appellate review and frequently applied by circuit courts, and this Court, in a variety of circumstances. Nevertheless,

> [t]here is widespread dissatisfaction with the present state of the law regarding appeals from non-final orders. The present scheme is freakish and inconsistent in its application; it denies review to many "non-final orders" whose immediate review would materially advance the litigation (in many instances by resolving issues standing in the way of settlement), or *whose resolution would aid in the development of the law*; and it leads to protracted collateral litigation on questions of "finality" and the courts of appeals' jurisdiction to review non-final orders.

Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules*, 1 J. App. Prac. & Process 285, 291 (1999) (emphasis added). Continued confusion among the circuit courts and litigants seeking immediate appellate review of district court rulings leads to frequent litigation of jurisdictional issues under the collateral order doctrine. *See id.* at 286-87 ("battles over jurisdiction to hear appeals from non-final orders will continue to consume a great deal of federal judges' time, often without deciding the merits of the case").

An important aspect of this problematic area of appellate jurisdictional law, which the Court has not resolved and which has led to conflicting circuit court rulings, is whether a party in a pending civil suit may ever use the collateral order

doctrine to appeal a discovery order, or must instead await a contempt citation (or other sanction) before pursuing a direct appeal. The Eleventh Circuit's approach—that it categorically lacks jurisdiction to review discovery orders under the collateral order doctrine—adds to the intolerably confused appellate law on this issue. As discussed below, the Third Circuit and certain Fifth Circuit panels have asserted collateral order doctrine jurisdiction over such discovery orders under certain circumstances, but other circuits (including the Eleventh Circuit) and other Fifth Circuit panels have reached the opposite conclusion, declaring categorically that the doctrine does not permit parties to take immediate appeals of discovery orders under any set of circumstances.

Unlike some circuits, the Third Circuit has "never held as a blanket rule that discovery orders are not appealable," *Smith v. BIC Corp.*, 869 F.2d 194, 198 (3d Cir. 1989) (asserting collateral order doctrine jurisdiction to review discovery order involving trade secrets). The Third Circuit has used the collateral order doctrine to review orders compelling parties to disclose information allegedly protected by various kinds of privileges—without requiring them to pursue an appeal from a contempt citation (or other sanction). *See Pearson v. Miller*, ___ F.3d ___, 2000 WL 486878 (3d Cir. Apr. 26, 2000); *Montgomery County v. Microvote Corp.*, 175 F.3d 296 (3d Cir. 1999); *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997); *accord Ben v. Schwartz*, 729 A.2d 547, 550-52 (Pa. 1999) (holding that Pennsylvania statute codifying *Cohen* collateral order doctrine permits immediate appeals of discovery orders). Recently, the Third Circuit has distinguished between appealable discovery orders involving "the narrow categories of trade secrets and traditionally recognized privileges," *Bacher*, 2000 WL 424320, at *4, and non-appealable discovery orders such as those that require a factual analysis of whether the information at issue is "relevant," *id.* at *6; *see supra* note 9 (distinguishing fact-

specific appellate issue in *Bacher* from pure, abstract question of law presented by NPC's appeal in this case).

The Fifth Circuit is a microcosm for the confusion in this area of law, with different panels having reached conflicting conclusions on the question of whether discovery orders can be appealed under the collateral order doctrine. In *Southern Methodist University Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979), the court rejected a jurisdictional challenge and held that the collateral order doctrine enabled it to review orders directing parties to disclose confidential information. Without requiring the parties to be cited for contempt or otherwise sanctioned, the court held that the appeal satisfied the elements of the collateral order doctrine because, *inter alia*, "review [of the order compelling disclosure] following a decision on the merits [of the underlying claims] would come too late to remedy any injury caused by the order," *id.* at 712. Eleven years later, another Fifth Circuit panel agreed and held that it had jurisdiction to review a party's collateral order doctrine appeal of a discovery order. *See Acosta v. Tenneco Oil Co.*, 913 F.2d 205, 207-08 (5th Cir. 1990). However, in a subsequent ruling, yet another Fifth Circuit panel dismissed a party's collateral order doctrine appeal of a discovery order for lack of jurisdiction. *See Texaco, Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43 (5th Cir. 1993). Although acknowledging the contrary holdings by Fifth Circuit panels in *Southern Methodist University* and *Acosta* and by the Third Circuit in *Smith*, 869 F.2d at 198, the *Texaco* court concluded that it was "bound" by the "'general rule [stated in a prior per curiam Fifth Circuit opinion] . . . that a discovery order incident to a pending action is not subject to appeal.'" *Texaco*, 995 F.2d at 44 (quoting *Honig v. E.I. duPont de Nemours & Co.*, 404 F.2d 410 (5th Cir. 1968) (per curiam)).

Conflicting directly with those Third Circuit and Fifth Circuit opinions that asserted collateral order doctrine

jurisdiction, the Second, Sixth, and Seventh Circuits have held categorically that the doctrine does not permit parties to take immediate appeals of discovery orders. *See supra* note 4.

Other circuits have not definitively barred all discovery orders from the reach of the collateral order doctrine, but have stated that such orders rarely qualify for immediate appellate review.[12] The D.C. Circuit has permitted a party to use the doctrine to appeal a protective order ruling, *see In re Rafferty*, 864 F.2d 151, 153-55 (D.C. Cir. 1988), but has also pointed out that "discovery orders are not usually appealable until the litigation has finally ended," *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 353 (D.C. Cir. 1995).[13]

In sum, the circuits are in disarray and have reached widely disparate conclusions on this important issue of federal appellate jurisdiction. This confused body of appellate law regarding when and how parties are permitted to appeal discovery orders under the collateral order doctrine creates

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[12] *See, e.g., In re Recticel Foam Corp.*, 859 F.2d 1000, 1004 (1st Cir. 1988) (dismissing party's appeal and stating that "discovery orders rarely satisfy all . . . of [the *Cohen*] criteria"); *Sedlock v. BIC Corp.*, 926 F.2d 757, 758 (8th Cir. 1991) (dismissing party's appeal and stating that "[g]enerally, pretrial discovery orders are not immediately appealable"); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749 (10th Cir. 1993) (dismissing party's appeal and stating that the court has allowed collateral order doctrine appeals of discovery orders "only in a few rare cases").

[13] The Ninth Circuit has taken a similar approach. *See Wharton v. Calderon*, 127 F.3d 1201, 1203-04 (9th Cir. 1997) (using collateral order doctrine to review party's appeal concerning protective order); *Marchetti v. Bitterolf*, 968 F.2d 963, 967 (9th Cir. 1992) (stating that court lacks "jurisdiction to conduct an interlocutory review of a discovery order"). The Fourth Circuit has held—in the different procedural posture of an appeal brought by a *non-party* witness—that it did not have collateral order doctrine jurisdiction to review the denial of a motion to quash a subpoena. *See MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 120-22 (4th Cir. 1994).

substantial uncertainty. This uncertainty causes delay and leads to more litigation because parties have no clear guidance as to whether they are entitled to appellate review before facing irreversible harm, such as being forced to reveal sensitive information that is privileged or otherwise protected by substantial confidentiality interests.

This problem is especially serious in the increasingly frequent phenomenon of "serial" litigation, where—as NPC has experienced here—lawsuits involving the same product are filed repeatedly in numerous jurisdictions against the same corporate defendant(s), often by one plaintiffs' law firm (or several firms working in concert). Under these circumstances, the circuit courts' differing approaches to resolving the scope of their collateral order doctrine jurisdiction lead to the question of the appealability of a significant discovery order, which could materially affect lawsuits pending in numerous courts around the country, being resolved based on the fortuity of which circuit court happens to review the order. Moreover, this disarray among the circuits creates the opportunity for improper forum-shopping by counsel who, recognizing that the discovery they seek may not be justified by existing law, pursue the discovery anyway on a "nothing ventured, nothing gained" theory, but only in those jurisdictions where a district court order compelling the discovery would not be immediately appealable.

By granting this petition, this Court would ensure that the circuit courts uniformly apply the collateral order doctrine to appeals of discovery orders; eliminate the potential for forum-shopping; and give the lower courts and parties much-needed guidance in how to interpret this important doctrine of federal appellate jurisdiction.

CONCLUSION

For all these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 4, 2000

APPENDIX

APPENDIX

[Filed Feb. 04, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13846-AA

ANGELA Y. PARNELL,
CLINTON T. PARNELL, *et al.*,
Plaintiffs-Appellees,

versus

SANDOZ PHARMACEUTICALS CORPORATION,
Defendant-Appellant.

Appeal from the United States Court for the
Northern District of Florida

Before TJOFLAT, BARKETT, and WILSON, Circuit Judges.

BY THE COURT:

Appellees' motion to dismiss this appeal for lack of jurisdiction is GRANTED. The district court's July 9, 1999, discovery order is neither final nor immediately appealable. *See* 28 U.S.C. §§ 1291, 1292; *Rouse Constr. Int'l, Inc. v. Rouse Constr. Corp.*, 680 F.2d 743, 745 (11th Cir. 1982). Appellees' motion to extend the briefing schedule and the motion of the Chamber of Commerce of the United States of America for leave to file an *amicus curiae* brief are DENIED as moot. Appellees' motion to file their jurisdictional reply brief under seal because it refers to a sealed document is DENIED as moot because the district court has since unsealed the document.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. 1:98cv176-MMP
FILE UNDER SEAL
[subsequently unsealed]

ANGELA PARNELL, *et al.*,
Plaintiffs,

vs.

SANDOZ PHARMACEUTICALS CORPORATION,
Defendant.

ORDER

This matter is before the court on the defendant's motion for clarification of the Magistrate Judge's order at doc. 34. The order, among other things, granted plaintiffs' motion to compel defendant to turn over all the records of the cases which involved certain ailments and Parlodel and which resulted in settlement agreements. The defendants now seek to have the court clarify the order to read that no settlements which contained confidentiality agreements should be disclosed. For the reasons which follow, that motion is DENIED.

As an initial matter, while Rule 408 of the Federal Rules of Evidence limits the introduction at trial of evidence regarding settlement negotiations, this rule does not itself govern discovery. *See United States v. Barrier Indus., Inc.*, 1997 WL 97842, at *2 (S.D.N.Y. Mar. 5, 1997). Moreover, this Court agrees with courts nationwide that although settlement

[Entered on Docket 7-12-99]
[Filed Jul. 9, 1999]

agreements sometimes contain confidentiality provisions, and might have been filed under seal, litigants cannot shield otherwise discoverable information from disclosure to others by agreeing to maintain its confidentiality, and cannot modify the Federal Rules of Civil Procedure by stipulation. *See, e.g., Tribune Co. v. Purcigliotti*, 1996 WL 337277, at *3 (S.D.N.Y. June 19, 1996); *Burda Media, Inc. v. Fritz G. Blumenberg*, 1999 WL 413469, *3-*4 (S.D.N.Y.).

Instead, settlement agreements which contain confidentiality provisions are subject merely to Rule 26(b)(1), Fed.R.Civ.P., which provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

In the instant case, the plaintiffs want to find out if the settlement agreements reveal a certain pattern of behavior by defendant. The dates and amounts of the settlements might reveal, plaintiffs assert, that defendant knew that Parlodel caused serious adverse effects such as those suffered by Angela Parnell, but that defendant withheld this information from FDA and the medical community, and misrepresented that Parlodel was safe, pursuant to a financially based strategy to protect its profits. That is, plaintiffs might try to show that it was cheaper for Sandoz to ignore the Parlodel problem and simply settle any cases that came along, rather than reporting the problems to the FDA or pulling the drug from store shelves. The amounts and dates of the settlements would be relevant to this argument.

Thus, the Court finds that the discovery of the settlement dates and amounts are reasonably calculated to lead to admissible evidence, and holds that the presence of confidentiality

provisions do not prevent their discovery. Thus the Magistrate Judge's order, which grants plaintiffs' motion to compel regarding all settlements, whether containing confidentially agreements or not, does not need to be clarified.

It is hereby

ORDERED AND ADJUDGED:

1. The defendant's motion for clarification (doc. 43) is DENIED.

DONE AND ORDERED this 9th day of July, 1999.

s/s Maurice M. Paul
MAURICE M. PAUL, SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

1:98cv176-1MMP

ANGELA Y. PARNELL, individually
and on behalf of her minor son,
GARRETT PARNELL, AND CLINTON PARNELL,
Plaintiffs,

vs.

SANDOZ PHARMACEUTICALS CORPORATION,
Defendant.

ORDER

Judge Paul has referred discovery motions to me for resolution. Plaintiffs have moved to limit the number of expert witnesses to 10 per side, to compel production of documents, and to strike Defendant's sixth affirmative defense. Doc. 25. Defendant filed a response. Doc. 30. These motions contain sufficient argument and a hearing is not needed.

While the "law of the case" argument is not persuasive,[1] Defendant has the better argument concerning the timing of settling the question of the number of Defendant's expert

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[1] "Under the law of the case doctrine, both the district court and the court of appeals generally are bound by findings of fact and conclusions of law *made by the court of appeals* in a prior appeal of the same case." *Riley v. Camp*, 130 F.3d 958, 962 (11th Cir. (Ga.) Dec 08, 1997) (emphasis added), *cert. denied*, 118 S.Ct. 2296 (1998), *quoting, United States v. Robinson*, 690 F.2d 869, 872 (11th Cir. 1982).

[Entered on Docket 4-6-99]
[Filed Apr. 5, 1999]

witnesses. Judge Paul has designated January 1, 2000, as the date when Defendant must name its experts. Doc. 24. As Plaintiffs are the ones who seek protection, it is unlikely that Plaintiffs will attempt to inundate Defendant with experts, but will select only those experts who are essential to prove the claim. Plaintiffs' designation of experts will sharpen the issue of what sort of experts Defendant will need. The question of limitation will really not become clear for resolution until Plaintiffs are confronted with the need to conduct discovery from Defendant's experts. Expert discovery continues until March 31, 2000. Doc. 24. The time to decide whether Plaintiffs need protection and whether the expense of this suit needs to be curtailed is shortly after January 1, 2000.

With respect to the motion to compel, Plaintiffs seek by requests for production 1 and 2 all interrogatories and answers in all civil suits for the last 20 years involving Defendant's product, Parlodel. Parlodel has been sold since 1978. Defendant states that it has been represented by a number of retained attorneys in such suits. The court will assume that Defendant has also represented to the court that Defendant's general counsel does not keep a litigation case file on all Parlodel litigation. If this is incorrect, counsel has a duty to so notify the court and opposing counsel. With that assumption made, acquisition of the interrogatories and answers for a 20 year period would be unduly burdensome upon Defendant given the probable differences in claims in all of such suits. The motion will be denied as to requests 1 and 2, but without prejudice should Plaintiffs show that the court's assumptions are incorrect.

Request for production 3 seeks all records of all claims concerning six listed types of injuries alleged to have been caused by Parlodel. Defendant has produced all adverse events reports found in the New Drug Application for Parlodel, but objects to further production.

Defendant's objection that this request is overbroad is generally not supported. The request is limited to six ailments which seem to be medically related to the conditions of the injury alleged by Plaintiffs. There is no need to redact the names as the documents are subject to a protective order. The only category of documents which seem to be completely beside the point are summonses. Defendant's objection that the request is unduly burdensome is not persuasive either. While Defendant seems to rely again on the argument that these documents lie in the hands of numerous law firms around the world, this request is not limited to law suits. Complaint letters, claim letters, and replies should be in a central corporate location, and if complaints and answers are not centrally located, Defendant may again say so. Finally, there is no "privilege" from discovery created by Fed.R.Evid. 408. *Alcon Intern. Ltd. v. S.A. Day Mfg. Co., Inc.*, 179 F.R.D. 403, 404 (W.D. N.Y. 1998); *NAACP Legal Defense and Educ. Fund v. Dept. of Justice*, 612 F.Supp. 1143, 1146 (D. D.C. 1985); *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., Inc.*, No. CIV. A. 97-3012, 1998 WL 186705, *3 (E.D. La. 1998); *Shipes v. BIC Corp.*, 154 F.R.D. 301, 309 (M.D. Ga. 1994) (but requiring a particularized showing of relevance).

Plaintiffs also have moved to strike defense six of Defendant, arguing that the defense is inappropriate in light of Defendant's answer to interrogatory 2. The proper procedure is first to test the response to interrogatory 2 by a motion to compel. Plaintiffs did, however, file a copy of the interrogatory and Defendant's response, and have asked in the alternative that the court compel an answer to that interrogatory. The parties have fully litigated the issue of whether a motion to compel should be granted. Defendant's objections as to "legal opinion of counsel" and the attorney-client and work product privileges are boiler-plate and are not persuasive. This is a simple question and has a simple answer. If Defendant does not yet so contend, but might as discovery progress, then Defendant should say so under oath. That does not mean that the

sixth defense should be stricken since discovery may make that defense viable at some future time.

Accordingly, it is ORDERED that Plaintiff's motion, doc. 25, to limit the number of experts is DENIED, Plaintiff's motion to compel production of documents as to request 3 is GRANTED (except as to summonses), but is DENIED as to requests 1 and 2, Plaintiff's motion to strike the Sixth Affirmative Defense is DENIED, but Plaintiff's motion, in the alternative, to compel an answer to interrogatory 2 is GRANTED. On or before April 27, 1999, Defendant shall produce for inspection and copying the documents identified in request 3 and shall serve an answer to interrogatory 2. Costs are not awarded as to this motion.

DONE AND ORDERED this 1st day of April, 1999.

/s/ William C. Sherrill, Jr.
WILLIAM C. SHERRILL, JR.
UNITED STATES MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
MAY 26 2000
CLERK

No. 99-1761

IN THE

Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION
f/k/a SANDOZ PHARMACEUTICALS CORPORATION,

Petitioner,

v.

ANGELA Y. PARNELL, Individually and on Behalf of Her Minor Son Garrett Parnell and CLINTON PARNELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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Appendix B — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Denying Petitioner's Petition For Panel Rehearing Dated And Filed December 1, 1999 ..... 2a

Petitioner invites the Court to extend the federal appellate jurisdiction to review a discovery order requiring the disclosure of certain past settlement dates and amounts. The order is clearly interlocutory, and clearly bound up with the merits of this action. Petitioner claims that the Court may hear the appeal because it presents "a pure question of law." But the factual and legal premises of Petitioner's claim are unfounded.

Factually, the order does not present a pure question of law. The trial judge entered the order after hearing counsel, based upon his understanding of the action as well as the parties' factual assertions relating to the plaintiffs' need for the material, the defendant's need for protection, and the probative value of the materials sought.

Legally, Petitioner's invitation is utterly unprecedented. Dozens of appellate decisions have held that discovery orders — even orders directing the disclosure of privileged material — are not immediately appealable. Petitioner asks the Court to overlook these long-settled decisions and, instead, create a new exception to the final judgment rule for appeals from discovery orders that supposedly present a "pure question of law." Not one decision from any appellate tribunal, however, has ever purported to expand the reach of the federal appellate jurisdiction to encompass appeals from discovery orders requiring the disclosure of confidential settlement data. And with good reason: The law already affords Petitioner adequate remedies to protect its interests. Such an expansion would violate long-settled principles requiring finality as a predicate for appellate jurisdiction, multiply collateral litigation in nearly every civil action, and (as this case amply demonstrates) give obstreperous defendants a means by which to prolong discovery and delay decisions in the cases against them.

Petitioner thrice sought its relief in the Eleventh Circuit: In a petition for a writ of mandamus, in a request for rehearing en banc the mandamus petition, and in an appeal under the collateral order doctrine established by *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1941). Each time, the Eleventh Circuit denied Petitioner's request. On the point here presented, there is no split in the federal appellate decisions, nor any other colorable justification for further review in this Court. Certiorari should be denied forthwith.

REASONS FOR DENYING THE WRIT

I. Review of the discovery order in this case necessarily must review the facts upon which it was based.

Petitioner argues that the trial judge erred because he ordered Petitioner to produce allegedly-confidential settlement data to Respondents; that Rule 408 of the Federal Rules of Evidence obliged the trial judge to require Respondents to make a "particularized showing" of need for those data before ordering their disclosure; and that the trial judge failed to apply such a standard when he ordered Petitioner to produce the data. *See* Petition at 3. Rule 408, however, governs only the introduction of settlement data at trial; it dos not purport to alter the discovery standards set forth in Rule 26 of the Federal Rules of Civil Procedure.

In any event, Judge Paul did, in fact, conduct the very analysis that Petitioner claims it was denied — *and that analysis is reflected in the body of the order itself.* Respondents had argued that Petitioner was aware of its product's hazards and had decided that it would be more profitable to leave the product on the market and settle such suits as might arise for injuries caused by the product, instead

of reporting the hazards to the FDA and removing the product from the market. Respondents further argued that they needed access to Petitioner's settlement data to help build their case on this point. Judge Paul agreed:

> In the instant case, the plaintiffs want to find out if the settlement agreements reveal a certain pattern of behavior by defendant. The dates and amounts of the settlements might reveal, plaintiffs assert, that defendant knew that Parlodel caused serious adverse effects such as those suffered by Angela Parnell, but that defendant withheld this information from the FDA and the medical community, and misrepresented that Parlodel was safe, pursuant to a financially based strategy to protect its profits. That is, plaintiffs might try to show that it was cheaper for Sandoz to ignore the Parlodel problem and simply settle any cases that came along, rather than reporting the problems to the FDA or pulling the drug from store shelves. The amounts and dates of the settlements would be relevant to this argument.

App. at 3a (Order dated July 9, 1999 (Paul, J.)). Judge Paul entered this order not only after entertaining the parties' submissions and arguments, but also with the benefit of his intimate knowledge of the case, having presided over it throughout its pendency in the Northern District of Florida.

Armed with this understanding of the parties' needs and circumstances, Judge Paul weighed Respondents' "particularized showing" of need for the confidential data against Petitioner's claim of confidentiality before ordering Petitioner to disclose them. Judge Paul's order on its face

conducts the very weighing that Petitioner claims it was denied here. If this Court hears this interlocutory appeal, then it must necessarily review Judge Paul's conclusion that, based on the facts and arguments presented to him, Respondents' need for the data outweighed Petitioner's interest in maintaining their confidentiality. That conclusion is firmly grounded in the facts presented below, it is clearly confided to the sound discretion of the trial judge, and it is certainly not the "pure legal issue" that Petitioner claims it to be.

II. Not one federal court has found jurisdiction to hear an appeal from an order directing the disclosure of confidential settlement data.

All of the Circuits agree that discovery orders are not proper subjects of *Cohen* appeals, even where the order requires a party to disclose sensitive or confidential information such as settlement data.[1] *See, e.g., Bacher v. Allstate Ins. Co.*, No. 99–

1. The Third Circuit, alone among the Courts of Appeals, has allowed *Cohen* appeals where the information to be disclosed is subject to traditional claims of privilege. *See, e.g., In re Ford Motor Co.*, 110 F.3d 954, 957–64 (3d Cir. 1997). The other Courts of Appeals have expressly disclaimed the Third Circuit's allowance of such appeals; as the Seventh Circuit, for example, has observed:

> a discovery order is not deemed collateral even if it is an order denying a claim of privilege. We so held emphatically in *Simmons v. City of Racine*, 37 F.3d 325 (7th Cir. 1994) and *Reise v. Board of Regents*, 957 F.2d 293, 295–96 (7th Cir. 1992), and this is the view of the other circuits as well, with the partial exception of the Third Circuit.

Dellwood Farms, Inc., v. Cargill, Inc., 128 F.3d 1122, 1125 (7th Cir. 1997) (citations omitted). *Accord, e.g., MDK, Inc. v. Mike's*

(Cont'd)

1572 (3d Cir. Apr. 20, 2000); *FDIC v. Ogden Corp.*, 202 F.3d 454, 458 & n.2 (1st Cir. 2000); *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 120–22 (4th Cir. 1994); *Simmons v. City of Racine*, 37 F.3d 325, 327 (7th Cir. 1994); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749–50 (10th Cir. 1993); *Texaco Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43, 44 (5th Cir. 1993); *Coleman v. American Red Cross*, 979 F.2d 1135, 1138 (6th Cir. 1992); *Chase Manhattan Bank v. Turner & Newall, PLC*, 964 F.2d 159, 162-63 (2d Cir. 1992); *Reise v. Board of Regents*, 957 F.2d 293, 295 (7th Cir. 1992); *Rouse Construction International, Inc., v. Rouse Construction Corp.*, 680 F.2d 743, 745 (11th Cir. 1982). And rightly so: A *Cohen* appeal lies only where the order is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468–69 (1978). Appeals from orders compelling the production of sensitive material can never meet this criterion because an aggrieved party may always disobey the order. If the Court enters a contempt sanction that may be purged only by disclosure, then the courts treat that sanction as a final order from which an immediate appeal lies.[2]

(Cont'd)

Train House, Inc., 27 F.3d 116, 120 n.2 (4th Cir. 1994); *Texaco Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43, 44 & nn.3 & 4 (5th Cir. 1993). Last month, the Third Circuit expressly recognized that its position had been criticized by the other circuits, and declined to extend it to allow appeals from orders requiring the production of settlement data, such as the order at issue in this appeal. *See Bacher v. Allstate Ins. Co.*, No. 99–1572 (3d Cir. Apr. 20, 2000). As this the order at issue here does not require the disclosure of any privileged material, the Third Circuit's longstanding departure from the norm is not material to this petition. *See Bacher*.

2. A lesser sanction not requiring the disclosure of the contested material does not, of course, threaten immediate or irreparable harm to the aggrieved party, and such orders may be reviewed upon a final judgment in the event the aggrieved party loses.

See, e.g., Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 377 (1981) ("Our rationale has been that in the rare case when appeal after final judgment will not cure an erroneous discovery order, a party may defy an order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling"); *United States v. Ryan*, 402 U.S. 530, 532–33 (1971); *Cobbledick v. United States*, 309 U.S. 323, 327–28 (1940); *Alexander v. United States*, 201 U.S. 117, 121–22 (1906).

This Court has often counseled that *Cohen* is "a 'narrow exception' . . . whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal." *Richardson-Merrell, Inc., v. Koller*, 472 U.S. 424, 430 (1985).

> We have accordingly described the conditions for collateral order appeal as stringent, and have warned that the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a "particular injustice" averted, by a prompt appellate court decision.

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994) (citations omitted), *quoting Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988); *accord Cunningham v. Hamilton County*, 527 U.S. 198 (1999).

Orders compelling the disclosure of allegedly-sensitive material clearly fall outside the ambit of these rules. A party threatened with irretrievable loss by such an order can always stand in contempt of it and take an immediate appeal from the contempt order, if need be. Moreover, as this case

unfortunately illustrates, such interlocutory appeals only delay, not speed, the ultimate disposition of the suit. As one decision correctly concluded:

> A judicially-created exception to nonappealability for categories of sensitive information is the quintessential slippery slope. Many parties faced with discovery requests are apt to regard the information sought as sensitive or confidential and seek, at a minimum, to delay its disclosure through an interlocutory trip to an appellate court.

MDK., Inc., 27 F.3d at 120. Direct appeals from discovery orders ought not be permitted because they encourage piecemeal adjudication of suits by the losers of every discovery dispute. *See MDK, Inc.*, at 121-22; *National Super Spuds v. New York Mercantile Exchange*, 591 F.2d 174, 180 (2d Cir. 1979) (Friendly, J.) ("the requirement of submission to contempt still serves a useful purpose in curtailing appeals, with consequent delay in litigation such as has occurred here").

CONCLUSION

The petition should be denied before the current term of the Court expires, so that the parties may conclude their discovery and proceed to trial without further delay.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR WRIT OF MANDAMUS DATED AND FILED SEPTEMBER 30, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13430-D

IN RE:

NOVARTIS PHARMACEUTICALS CORPORATION,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Florida

Before ANDERSON, Chief Judge, and DUBINA, Circuit Judge.

BY THE COURT:

The Petition for Writ of Mandamus is DENIED. *See Rouse v. Construction International, Inc. v. Rouse Construction Corp.*, 680 F.2d 743, 745 (11th Cir. 1982) ("Ordinarily, a litigant seeking to overturn a discovery order has two choices. Either he can comply with the order or he can refuse to comply with the order and contest its validity if subsequently cited for contempt for his refusal to obey.").

The motion of the Chamber of Commerce to file an *amicus* brief is DENIED as moot.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITIONER'S PETITION FOR PANEL REHEARING DATED AND FILED DECEMBER 1, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13430-D

IN RE:

NOVARTIS PHARMACEUTICALS CORPORATION,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Florida

BEFORE: ANDERSON, Chief Judge, TJOFLAT and DUBINA, Circuit Judge.

BY THE COURT:

Petitioner's petition for panel rehearing is DENIED.

(3)

Supreme Court, U.S.
FILED
JUN 05 2000
CLERK

No. 99-1761

IN THE
Supreme Court of the United States

SANDOZ PHARMACEUTICALS CORPORATION,
now known as Novartis Pharmaceuticals Corporation,
Petitioner,

v.

ANGELA Y. PARNELL, individually and on behalf of her minor son GARRETT PARNELL, and CLINTON PARNELL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR PETITIONER

The Brief in Opposition does not dispute one of the central points of the Novartis Pharmaceuticals Corporation ("NPC") Petition—that it is important for this Court to ensure that federal appellate courts correctly and uniformly construe the scope of their collateral order doctrine jurisdiction. The Respondents ("the Parnells") also do not dispute the importance of the issue presented by NPC's Eleventh Circuit appeal: what legal standard governs when district courts consider discovery requests for confidential settlement agreements reached in other lawsuits. Nor does the Brief in Opposition disagree with NPC's argument that the collateral order doctrine analysis is materially different for appeals that present a pure question of law (as opposed to appeals seeking review of a fact-bound or discretionary ruling).

Instead, the Parnells' argument rests on two premises: (1) that NPC's appeal did not present a pure question of law because the district court already applied the particularized showing standard sought by NPC, *see* Brief in Opp. at 1-4; and (2) that "[a]ll of the Circuits agree that discovery orders are not proper subjects of *Cohen* appeals, even where the order requires a party to disclose sensitive or confidential information such as settlement data," *id.* at 4. As explained below, both contentions are demonstrably incorrect—and neither undermines the conclusion that the Court should grant the Petition to give federal courts and litigants much-needed guidance in how to apply the collateral order doctrine when an appeal of a discovery order presents an important, pure question of law completely separate from the merits of the underlying lawsuit.

I. NPC's Appeal Presented A Pure Question Of Law: Whether The District Court Erred In Applying The Liberal Discovery Standard Of Rule 26(b)(1) Instead Of The More Demanding "Particularized Showing" Standard Sought By NPC.

In an effort to establish that NPC's Eleventh Circuit appeal requires a fact-intensive inquiry at odds with the principles upon which the collateral order doctrine is based, the Parnells claim that the district court did conduct the particularized showing analysis that NPC argues should have been, but was not, conducted. *See* Brief in Opp. at 2-4.[1] They have, however, mischaracterized the court's analysis to fit their argument.

The order at issue, Petition App. 2a-4a, plainly shows that the district court did *not* apply a particularized showing standard, but instead evaluated the Parnells' extraordinary document request only by the more liberal standard of Federal Rule of Civil Procedure 26(b)(1). The court began its analysis of this issue by stating that "settlement agreements which contain confidentiality provisions are subject *merely* to Rule 26(b)(1)," Petition App. 3a (emphasis added), and went on to quote the rule itself. The subsequent paragraph—which the Parnells quote to support their contention that the court applied the particularized showing standard, *see* Brief in Opp. at 3—actually undermines that contention. After summarizing the Parnells' argument, the court simply concluded that "[t]he amounts and dates of the settlements would be *relevant* to this argument." Petition App. 3a (emphasis added). The Brief in Opposition also fails to quote from (or refer to) the subsequent paragraph, where the district court again used language straight out of Rule 26(b)(1). *Id.*

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[1] Although the Parnells imply that NPC relied only on Federal Rule of Evidence 408, *see* Brief in Opp. at 2, NPC's argument is based on numerous other authorities and important public policy concerns that support the particularized showing standard, *see* Petition at 18-21.

("the Court finds that the discovery of the settlement dates and amounts are [*sic*] *reasonably calculated to lead to admissible evidence*" (emphasis added)). The district court's order nowhere used the term "particularized showing" (or any comparable language), and there is no basis to conclude that it applied this standard.[2]

In sum, NPC's appeal to the Eleventh Circuit presented a pure question of law and argued that the district court erred in applying the liberal discovery standard of Rule 26(b)(1), instead of the particularized showing standard applied by most district courts, *see* Petition at 16 & n.7 (citing cases). As explained in NPC's Petition, which legal standard governs discovery requests for confidential settlement agreements from other lawsuits is a pure question of law that an appeals court would review de novo, without becoming enmeshed in a fact-intensive inquiry, and that should be resolved under the collateral order doctrine.

II. No Reported Federal Appellate Court Opinion Has Addressed The Precise Question Presented In NPC's Petition.

The Petition demonstrates that collateral order doctrine review of a pure question of law that is important and completely separate from the merits of the underlying lawsuit—here, the legal standard governing the discoverability of confidential settlements from other suits—should not be *per se* barred solely because the question arises in a discovery order. Attempting to portray the issue raised in the Petition as well-settled by "[a]ll of

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[2] The conclusion that the district court applied the Rule 26(b)(1) standard is also consistent with the Parnells' filings in support of their motion to compel, which relied on Rule 26(b)(1); argued that the settlement agreements are "relevant and reasonably calculated to produce admissible evidence"; and never contended that the Parnells had made a particularized showing of need for these documents. *See* Plaintiffs' Mem. of Law (served February 18, 1999) at 2; Plaintiffs' Mem. of Law (served May 12, 1999) at 1, 4.

the Circuits," Brief in Opp. at 4-5, the Parnells cite a string of ten reported opinions. But none of these cases addresses the question presented in NPC's Petition. Although the Parnells cite these cases for the proposition that discovery orders cannot be appealed under the collateral order doctrine even when they "require[] a party to disclose sensitive or confidential information such as settlement data," *id.* at 4, nine of the cases did not in any way involve settlement data. Moreover, the only opinion that involved a settlement-agreement-discovery order did not consider the pure question of law presented in NPC's appeal. *See Bacher v. Allstate Ins. Co.*, ___ F.3d ___, 2000 WL 424320, at *4 (3d Cir. Apr. 20, 2000) (declining to exercise collateral order doctrine jurisdiction and expressing doubt that doctrine's "separability" requirement is satisfied, because appellate review would necessarily require inquiry into whether settlement information at issue "is relevant to the merits of [the plaintiffs' claims]").

Nor has this Court resolved the question presented in the Petition. Two of the cases cited by the Parnells held that witnesses cannot immediately appeal the denial of a motion to quash a grand jury subpoena without first being held in contempt. *See* Brief in Opp. at 6 (citing *Cobbledick v. United States*, 309 U.S. 323 (1940); *United States v. Ryan*, 402 U.S. 530 (1971)). The *Cobbledick/Ryan* rule does not apply to this *civil* suit; the rule is based on the need to ensure the expeditious and effective administration of federal *criminal* proceedings, *see Cobbledick*, 309 U.S. at 324; *Ryan*, 402 U.S. at 533, and this Court has "interpreted the collateral order exception with the utmost strictness in criminal cases," *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (quotation marks omitted); *see Flanagan v. United States*, 465 U.S. 259, 265 (1984). An interlocutory appeal involving a grand jury subpoena also makes it difficult (if not impossible) for an appeals court to evaluate one of the essential collateral order doctrine requirements—that the appellate issue be separate from the merits of the underlying ac-

tion—because a grand jury subpoena involves secret, pre-indictment proceedings that occur before any "action" has been identified. *See In re: Grand Jury Subpoena*, 190 F.3d 375, 383-84 (5th Cir. 1999).[3]

Notwithstanding the Parnells' over-simplified and inaccurate summary of the contempt law applicable to this case, *see* Brief in Opp. at 5-6, the district court's order *is* effectively unreviewable on a later appeal, as required by the third prong of the collateral order doctrine, if NPC is barred from securing appellate review now. If NPC produces these confidential documents, no appeals court can cure the irreparable harm to NPC's legal interests. If NPC declines to produce the documents, there is little likelihood that it will have an effective appellate remedy, due to the confused and much-criticized state of contempt law and the uncertainty surrounding what kind of contempt citation (or other sanction) the district court may impose. *See* Petition at 22-23.

Under these circumstances, and in light of the benefits to numerous courts and litigants that would flow from federal appellate resolution of the important legal issue presented by NPC's appeal, *id.* at 12-16, a ruling by this Court directing the Eleventh Circuit to hear that appeal would be entirely consistent with the Court's collateral order doctrine jurisprudence. A ruling along these lines would not lead to a flood of interlocutory appeals of discovery orders because such orders rarely present important,

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[3] The Parnells' reliance on *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981), is also misplaced. The sentence quoted from that opinion, *see* Brief in Opp. at 6, is plainly dictum, because the *Firestone* Court held that the collateral order doctrine does not permit appeals from orders disqualifying counsel. In any event, the language from *Firestone* quoted by the Parnells is distinguishable for the same reasons discussed above in connection with *Cobbledick* and *Ryan*, which were the only two cases cited in this part of the *Firestone* opinion, 449 U.S. at 377. Nor does *Alexander v. United States*, 201 U.S. 117 (1906)—which was decided over forty years before *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)—resolve the collateral order doctrine question presented in NPC's Petition.

pure questions of law. *See id.* at 12-14 (discussing legal question/factual issue distinction and other "limiting principles" that would prevent most discovery orders from being appealed under the collateral order doctrine). Moreover, to be immediately appealable, a discovery order would have to resolve an issue "completely separate from the merits of the action," *Johnson v. Jones*, 515 U.S. 304, 310 (1995) (quotation marks omitted), which would ensure that—even when such appeals are heard—the vast majority of civil suits would continue proceeding towards trial without unduly delay.[4]

For the foregoing reasons and those set forth in the Petition, the Court should review the Eleventh Circuit's jurisdictional ruling in this case.

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[4] For example, the settlement-agreement-discovery order at issue in this case is so clearly collateral to the merits of the underlying claims and defenses that NPC's efforts to obtain appellate review of this narrow question have not prevented the parties from pursuing extensive discovery on other issues related to the merits—including whether the Parnells can meet the difficult burden of proving that NPC's product caused the injuries alleged in their complaint, based on scientifically reliable expert evidence that is admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny.